Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: *Nevsun Resources Limited v Araya*

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Abstract

Corporate liability for violations of fundamental human rights has become a major issue in numerous legal systems. This article considers the legal situation in Canada concerning the admissibility of such claims before the Canadian courts. This follows the recent, and significant, Canadian Supreme Court majority decision in *Nevsun Resources Limited v Araya* which held admissible claims made by Eritrean claimants that they had suffered violations of their fundamental human rights by being conscripted to work and systematically abused, contrary to fundamental international law standards, in a mine owned and controlled by the Eritrean subsidiary of Nevsun, a Canadian multinational mining corporation. The majority decision involves many novel, and controversial, legal issues considering the scope of international law-based human rights claims against private corporations, leading to significant dissenting judgments which may influence the course of any eventual trial of the claims. The case involved a number of key issues: whether the claims were subject to the act of state doctrine, as the claims involved showing *inter alia* that the Eritrean government had forced the claimants to work at the mine; whether the claims could arise directly out of customary international law prohibitions against violations of fundamental human rights, involving issues concerning the reception of customary international law into Canadian domestic law and the proper constitutional role of the courts in this process; and whether the claims could be adequately covered through existing torts under Canadian law or whether new torts, based on international human rights law, should be developed given the heinous nature of the alleged violations, involving, as they did, allegations of forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity. The article assesses the legal arguments in the case on a doctrinal and

comparative basis referring to relevant US and English law. It concludes by considering whether judicial activism, of the kind displayed by the majority, is legitimate in this novel and developing field of international law.

Keywords: act of state, multinational enterprises, business and human rights, customary international law, corporate liability, tort law, fundamental human rights, *jus cogens*, relationship between international and domestic law

[A] INTRODUCTION

Corporate liability for violations of fundamental human rights has become a major issue in numerous legal systems.[1] The typical case involves a parent, or affiliate, corporation incorporated in the forum jurisdiction being sued by foreign claimants for alleged violations of their human rights committed by a subsidiary in the host state of which they are residents, usually a developing country where legal redress is effectively non-existent. Until recently, the United States led the world with corporate human rights litigation brought under the Alien Tort Claims Act (ATCA), but this has been significantly restricted by the US Supreme Court. In particular, in *Jesner v Arab Bank* (2018) the Supreme Court excluded claims against foreign corporations from the ambit of ATCA. Though this still leaves open the possibility of claims against US corporations, following the Supreme Court in *Kiobel v Royal Dutch Petroleum* (2013), which held that ATCA did not remove the presumption against the extraterritorial application of US law, it is unlikely that ATCA will give rise to many future claims against US parent companies for the overseas conduct of their subsidiaries, though claims continue to be lodged against US-based corporations.[2] By contrast, claimants in England have followed a tort-based route to establishing liability rather than relying on human rights-based claims, though no case has yet reached a decision on the merits.[3]

A different approach has been taken by the Supreme Court of Canada in its recent decision in *Nevsun Resources v Araya* (2020). By a majority, the Supreme Court held that foreign claimants have the right to bring claims against a Canadian parent company based on alleged violations of fundamental human rights committed by its overseas subsidiary. The

1 For detailed comparative analysis see Business and Human Rights Resource Centre (2020).

2 See e.g. *Doe v Nestle* (2018), currently under consideration for appeal by the US Supreme Court.

3 See e.g. *Vedanta Resources plc and another v Lungowe & Ors* (2019) and Meeran (2011).

decision contains many novel and, indeed, controversial ideas which appear to make Canadian law *prima facie* amenable to transnational business and human rights litigation. However, as will be shown, the decision leaves many issues unsettled. This is especially so given the strongly reasoned dissenting judgments, which will be considered in some detail. As for non-Canadian companies, this matter is not touched upon directly, but the decision applies to Nevsun as a 'company bound by Canadian law' (*Nevsun* 2020: paragraph 132) and so may extend to Canadian incorporated affiliates of non-Canadian parent companies.

[B] THE FACTS OF THE CASE

The claimants, three workers at the Bisha mine in Eritrea, owned by Canadian mining corporation Nevsun Resources Limited, brought a class action on behalf of over 1000 workers who claim to have been compelled to work at the Bisha mine between 2008 and 2012. They sought damages for breaches of domestic torts including conversion; battery; false imprisonment; conspiracy; and negligence. In addition, they sought damages for breaches of customary international law prohibitions against: forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity (*Nevsun* 2020: paragraph 4).

The claims arose out of Eritrea's National Service Program, established in 1995, requiring all Eritreans upon reaching the age of 18 to undertake six months of military training followed by 12 months of 'military development service'. Conscripts were assigned to direct military service and/or 'to assist in the construction of public projects that are in the national interest' (*Nevsun* 2020: paragraph 9). The Bisha mine produces gold, copper and zinc and is one of the largest sources of revenue for Eritrea. It was established in 2008 under the ownership of the Bisha Mining Share Company (BMSC) which is 40 per cent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60% owned by Nevsun, a publicly held corporation incorporated in British Columbia (*Nevsun* 2020: paragraph 7). Conscript labour was provided for the mine through subcontracts entered into between a South African company, SENET, hired to construct the mine on behalf of the Bisha Company, and Mereb Construction Company, controlled by the Eritrean military, and Segen Construction Company, owned by Eritrea's only political party, the People's Front for Democracy and Justice. Both companies received conscripts from the National Service Program (Nevsun 2020: paragraph 8). In 2002 military conscription was indefinitely extended and conscripts were forced to provide labour at subsistence wages. At Bisha, conscripted tenure was indefinite.

The three main claimants, Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle, alleged that they were working in harsh and dangerous conditions for years and were subjected to cruel and degrading punishments. Their pay was docked if they became ill, a common occurrence at the mine. They were confined to camps and could only leave under authorization. Absence without leave was severely punished (*Nevsun* 2020: paragraphs 10-13). In addition, unlike his co-claimants, who were conscripts, Gize Yebeyo Araya was initially a volunteer but was forced to continue his military service after completing his 18 months. All three eventually escaped from Eritrea and became refugees in Canada (*Nevsun* 2020: paragraphs 13-15).

At first instance, Nevsun sought to set aside the claims on the grounds of *forum non conveniens*, as Eritrea was the more appropriate forum; to strike out some of the claimants' evidence; alternatively, to strike out on the grounds that the British Columbia courts lacked subject-matter jurisdiction under the act of state doctrine; and to strike out the pleadings so far as they were based on customary international law as these were unnecessary and disclosed no reasonable course of action (*Nevsun* 2020: paragraph 16). Having established that Nevsun exercised effective control over the Bisha Company through its majority position on the company's board and operational control through its involvement in all aspects of Bisha's operations, Abrioux J dismissed Nevsun's motions to strike (see *Araya v Nevsun Resources Limited* 2016). The Court of Appeal upheld the first instance decision (see *Araya v Nevsun Resources Limited* 2017)). On appeal to the Canadian Supreme Court, Nevsun focused on two issues only: the applicability of the act of state doctrine and whether the customary international law prohibitions against forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity could ground a claim for damages under Canadian law.

[C] ACT OF STATE DOCTRINE AND HUMAN RIGHTS CLAIMS

The act of state doctrine evolved to meet the need for judicial restraint when issues involving the acts of foreign states arose in domestic legal proceedings. It is an expression of the sovereign equality of states based on the principle that 'domestic courts should not "sit in judgment" on the laws or conduct of foreign states.' (Newbury, 2019: 7). Despite this apparently simple formulation, in practice the doctrine has caused significant complexity, if not confusion, as to its proper limits, especially at the admissibility stage of proceedings. This is due, in large part, to

emerging limitations on the absolute territorial sovereignty of the state through increased subjection to international obligations concerning the treatment of individuals within its territory. The most conspicuous example is the rise of international human rights laws which raises a question at the heart of the *Nevsun* case: where a human rights claimant has to aver to the conduct of a foreign state in making their case does that render the claim non-justiciable?

Historically, although the English courts have barred claims where the lawfulness or validity of acts of the foreign state would have to be determined, an exception has emerged whereby acts of state, including legislation, based on violations of fundamental human rights that are contrary to the public policy of the forum will not be given effect (see *Oppenheimer v Cattermole* 1976), as has a wider exception based on an act of state that is in clear violation of international law more generally (see *Kuwait Airways Corporation v Iraqi Airways Co* 2002). In the most recent case of *Belhaj v Straw* (2017), a case concerning allegations of UK involvement in the detention and torture of the claimants at the hands of foreign states, Lord Sumption, who was followed on this point by five out of the seven judges (Newbury 2019: 45), held that:

> it would be contrary to the fundamental requirements of justice administered by an English court to apply the foreign act of state doctrine to an allegation of civil liability for complicity in acts of torture by foreign states. Respect for the autonomy of foreign sovereign states, which is the chief rationale of the foreign act of state doctrine, cannot extend to their involvement in torture, because each of them is bound *erga omnes* and along with the United Kingdom to renounce it as an instrument of national or international policy and to participate in its suppression. In those circumstances, the only point of treating torture by foreign states as an act of state would be to exonerate the defendants from liability for complicity (paragraph 262).

In coming to its decision that the act of state doctrine was no bar to the claims before it, the Canadian Supreme Court noted that their Lordships in *Belhaj* gave four separate sets of reasons for their decision which led to considerable confusion over the limits of act of state (*Nevsun* 2020: paragraphs 40-42).[4] The Canadian Supreme Court also found confusion in the Australian cases on this issue (*Nevsun* 2020: paragraphs 42-43). Accordingly, Canada could go a different way.

Under Canadian law, the principles underlying the act of state doctrine had been completely subsumed within principles of private international law which generally called for deference when dealing with questions of

[4] For detailed analysis see Newbury (2019: 28-40).

enforcing foreign laws, 'but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law' (*Nevsun* 2020: paragraph 45). The Supreme Court declined to follow the English act of state doctrine, or to accept Nevsun's argument that it formed part of Canadian law (*Nevsun* 2020: paragraphs 56-59). Accordingly, act of state was no bar to the admissibility of the respondent's claims.

Moldaver and Côté JJ dissented on this point. They felt that the claims arose on the plane of international affairs for resolution in accordance with principles of public international law and diplomacy and so were non-justiciable before the Canadian courts (*Nevsun* 2020: paragraph 271). In particular, adjudication of this case would impermissibly interfere with the conduct by the executive of Canada's international relations (*Nevsun* 2020: paragraph 276). The act of state doctrine under Canadian law was indeed a part of private international law as asserted by the majority, but this did not negate the existence of a rule of non-justiciability under Canadian law whereby 'a court should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law' (*Nevsun* 2020: paragraph 286).

Issues involving violations of international law could not be subsumed under rules of private international law, such as choice of law, as these do not mediate between domestic legal systems and the international legal system, this being an issue determined under Canada's domestic constitutional arrangements (Nevsun 2020: paragraph 292). Justiciability was rooted in a commitment to the constitutional separation of powers which required the courts to defer to the executive and legislature so as to refrain from unduly interfering with their legitimate institutional roles (*Nevsun* 2020: paragraph 294). Accordingly, although the court had the institutional capacity to hear a private claim which impugns the lawfulness of a foreign state's conduct under international law, it would be overstepping the limits of its proper institutional role (*Nevsun* 2020: paragraph 296). The constitutional separation of powers that rendered such cases non-justiciable also excluded any public policy exception (*Nevsun* 2020: paragraph 301). In addition, if the Canadian courts accepted the power to pass judgment in such cases:

> that could well have unforeseeable and grave impacts on the conduct of Canada's international relations, expose Canadian companies to litigation abroad, endanger Canadian nationals abroad and undermine Canada's reputation as an attractive place for international trade and investment. Sensitive diplomatic matters which do not raise domestic public law questions should be kept out of the hands of the courts (*Nevsun* 2020: paragraph 300).

This conclusion was supported by the absence of any legislative mandate or constitutional imperative for the courts to review the legality of a foreign state's executive or legislative acts in a private law claim, which distinguished this case from public law decisions such as whether municipalities could levy rates on foreign legations, or whether federal or provincial governments possessed property rights in the Canadian continental shelf, or the power to examine the human rights records of foreign countries in extradition and deportation cases that the majority had relied on as proof that the courts could adjudicate on human rights issues in private law claims (*Nevsun* 2020: paragraphs 303-304).

Turning to the facts, Moldaver and Côté JJ held it was clear that the legality of Eritrea's acts under international law was central to the respondents' claims. The respondents alleged that Nevsun was liable because it was complicit in the Eritrean authorities' allegedly internationally wrongful acts, namely, that the National Service Program was a system of forced labour that constituted a crime against humanity. The respondents' claims, as pleaded, thus required a determination that Eritrea had violated international law and as such were bound to fail (*Nevsun* 2020: paragraph 312).

The choice between the majority and minority is a fine one and much depends on what is perceived to be just in such cases. At first sight the obvious reaction may be that judges should sweep aside inconvenient rules of law to achieve just ends. However, the minority's view cannot be so easily dismissed. The separation of powers doctrine is a cornerstone of democratic government. As stated by Montesquieu:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty … there is no liberty if the power of judging is not separated from the legislative and executive… there would be an end to everything, if the same man or the same body … were to exercise those three powers (House of Commons 2011: 2; citing Montesquieu *c*1748).

The US follows a strict doctrine of separation of powers, while the UK takes a more nuanced approach based on a 'balance of powers', though, in more recent years, the separation of the three branches of government has become more pronounced with developments including the establishment of the UK Supreme Court, replacing the Judicial Committee of the House of Lords as the highest judicial organ in the UK (House of Commons 2011). The Canadian system recognizes a formal separation of powers under the Constitution Acts (1867-1982) but is closer to the UK experience. While there is much debate in Canada over the lack of separation between the executive and legislature, the courts appear to

have a measure of independence from the other branches and remain ready to assess executive and legislative action in appropriate cases. (see Richard 2009; Roach 2018; Van Santen 2018).

The impact of the Canadian Charter of Rights and Freedoms (Canada Constitution Acts 1867 to 1982) is a significant development in this regard (Roach, 2018). For example, in the leading case of *Doucet-Boudreau v Nova Scotia* (2003) the Canadian Supreme Court upheld, by a majority, the right of the Nova Scotia courts to order a scheme for the introduction of francophone rights, guaranteed under the Charter, for the French-speaking minority of Nova Scotia following years of governmental inaction. In relation to the Canadian government's foreign policy role, the Canadian Supreme Court in *Operation Dismantle v The Queen* (1985) held that foreign policy decisions were reviewable under the Charter, though with a measure of restraint. The case accepted that the Charter applied to Cabinet's decision to allow the United States to test cruise missile technology in Canada's north and overturned lower court decisions and government arguments that the decision was non-justiciable.

Thus, the Canadian courts accept a degree of judicial intervention, including in relation to foreign policy, in human rights cases. However, the courts retain a high degree of discretion over the merits and remedies and have used this to recognize legitimate state interests in Charter cases. In *Operation Dismantle* (1985), for example, the Supreme Court found that, while it could review the government's actions, the claim, brought by the appellant peace group, that cruise missile testing increased the risk of nuclear war was dismissed as showing no actual threat that could lead to any person's rights under the Charter being violated. In other cases, declarations have been issued giving the executive considerable discretion over how to meet the court's concerns of conformity with the Charter (Roach 2018: 324-325).

Returning to the *Nevsun* decision, the above factors suggest that the majority is in line with wider Canadian judicial approaches to human rights questions and non-justiciability, while the minority dissent has overemphasized the need for judicial restraint and separation of powers and has also introduced factors, such as harm to Canadian trade and investment, which should not be traded off in a cost–benefit analysis with the observance of human rights by Canadian corporations. As Abella J noted in the opening two paragraphs of her majority opinion:

> [1] This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was

> to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.
>
> [2] The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases (*Nevsun* 2020).

This perspective is given strength by Lord Mance, one of the Supreme Court judges in *Belhaj*, who, in the course of a speech given in 2017, said:

> The courts have an important role in ensuring the legality and propriety of executive action, at home and abroad. They can never be primary decision-makers. It is the function of the executive to decide and to administer, and the executive is in many respects much better placed to judge on the necessity or appropriateness of action at the international level. At the same time, there are limits, and deprivation of liberty or allegations of torture are example of areas where courts may be expected to become involved (Mance 2017).

Given the decision in *Belhaj*, and the human rights public policy exception to the act of state doctrine under English law, his Lordship offers a succinct summary of the English position. The majority in *Nevsun* are following a similar path, albeit through distinctive reasoning.

Turning from technical legal justifications for the majority view, wider Canadian public policy developments also confirm that their decision is appropriate. In particular, in January 2018, the government of Canada announced new initiatives for responsible business conduct abroad, an Ombudsperson and a Multi-stakeholder Advisory Body on Responsible Business Conduct. The Canadian Ombudsperson for Responsible Enterprise (CORE), currently Sheri Meyerhoffer, is the first position of its kind in the world. The CORE is:

> mandated to review allegations of human rights abuses arising from the operations of Canadian companies abroad. Recommendations made by the Ombudsperson will be reported publicly, and companies that do not cooperate could face trade measures, including the withdrawal of trade advocacy services and future Export Development Canada support. While serving in this role, the new Ombudsperson will focus on the mining, oil and gas, and garment sectors and is expected to expand to other sectors in the first year of operation. This appointment underlines the importance of inclusive trade and respect for the fundamental rights of people abroad, as part of Canada's trade diversification strategy, and reflects Canada's commitment to responsible business around the world (Global Affairs Canada 2019; and see Canada Order in Council, 2019).

Given this development,[5] it would be odd if the Canadian courts were to refuse even to consider claims arising out of alleged human rights violations by the overseas subsidiaries of Canadian companies where these involve complicity with the host state authorities.

That said, the Supreme Court has so far only accepted that admissibility will not be determined by any concept of non-justiciability. This is far from saying that, at any eventual trial of the issues, the judge will not consider further the core issues underlying the act of state doctrine, namely, comity and equality of states. As noted by Newbury (2019: 46), 'these difficulties will require trial judges to give even fuller consideration to the problematic and changing interface between domestic and international law'.

[D] HUMAN RIGHTS CLAIMS ARISING OUT OF CUSTOMARY INTERNATIONAL LAW

The second limb of Nevsun's appeal was that claims based directly on customary international law violations should be struck out as they disclosed no reasonable claim or were unnecessary. The Supreme Court rejected this line of argument and upheld the lower courts' decisions as it was not 'plain and obvious' that the claims had no reasonable prospect of success or were unnecessary. This finding is bound up with the Supreme Court's view concerning the role of the Canadian courts in the ongoing development of international law. Citing academic sources, the majority accepted that Canadian courts were an active participant in the global development of international principles in the fields of human rights and other laws impinging on the individual (*Nevsun* 2020: paragraph 70), that international law not only comes down from the international to the domestic sphere but also 'bubbles up' from national courts (*Nevsun* 2020: paragraph 71) and that Canadian courts should meaningfully contribute to the 'choir' of domestic court judgments around the world shaping the 'substance of international law' (*Nevsun* 2020: paragraph 72).

Against this background, the Supreme Court's initial task was to determine whether the respondent's claims made under the prohibitions of forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity were part of Canadian law. This involved a two-step process: whether these prohibitions were part of customary international law and whether they were part of Canadian law.

[5] Which has been criticized for limiting the CORE's powers of subpoena and investigation see Canadian Network on Corporate Accountability (2019).

On the first question, the majority accepted that these prohibitions formed part of customary international law. The norms relied upon by the Eritrean workers had 'emerged seamlessly from the origins of modern international law, which in turn emerged responsively and assertively after the brutality of World War II' (*Nevsun* 2020: para 75). They also fulfilled the two requirements for a norm of customary international law to be recognized as such involving a 'general but not necessarily universal practice and *opinio juris*, namely the belief that such practice amounts to a legal obligation' (*Nevsun* 2020: para 77). Furthermore, crimes against humanity and the prohibition against slavery were of such fundamental importance as to be characterized as jus cogens, or peremptory norms of international law, from which no derogation is permitted (*Nevsun* 2020: paras 83-84 and 99-101), while the prohibition against forced labour was described by the International Labour Organization (ILO) as a peremptory norm and was at least undoubtedly a norm of customary international law (*Nevsun* 2020: para 102). The prohibition against cruel, inhuman and degrading treatment was an absolute right which no social goal or emergency could limit (*Nevsun* 2020: para 103).

On the second question, the majority, relying on a mix of academic sources and common law cases, viewed customary international law as automatically adopted into Canadian domestic law without any need for legislative action, making it part of the common law of Canada in the absence of conflicting legislation (see *Nevsun* 2020: paras 85-95). As a result, Canadian courts must treat public international law as law, not fact, and must give judicial notice to such law not requiring formal proof of international law through evidence (*Nevsun* 2020: paras 96-98).

In response Nevsun argued that, even if the norms relied on by the respondents were part of Canadian law, it was immune from their application because it was a corporation. Relying exclusively on academic opinion, the majority rejected this argument. International law had evolved beyond its state-centric template, and there was no tenable basis for restricting the application of customary international law to relations between states, especially as human rights law transformed international law and made the individual an integral part of this legal domain (*Nevsun* 2020: paras 104-110). Citing Professor Beth Stevens, the majority asserted that human rights could be violated by private actors and that 'there is no reason why "private actors" excludes corporations' (*Nevsun* 2020: para 111). Citing Professor Howard Koh, the majority added that there was no reason why a corporation could not be held civilly liable for a violation of human rights law (*Nevsun* 2020: para 112). Abella J, for the majority, concluded:

> As a result, in my respectful view, it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law', or indirect liability for their involvement in what Professor Clapham calls 'complicity offenses' (Koh, 'Separating Myth from Reality', at pp. 265 and 267; Andrew Clapham, 'On Complicity', in Marc Henzelin and Robert Roth, eds., Le Droit Pénal à l'Épreuve de l'Internationalisation (2002), 241, at pp. 241-75).

This conclusion was reinforced by the absence of any Canadian laws which conflicted with the adoption of the norms relied upon by the respondents or their application to Nevsun. On the contrary, the fact that the Canadian government had created the CORE showed that it had adopted policies to ensure that Canadian companies operating abroad respected these norms (*Nevsun* 2020: paras 114-5).

The final issues raised by Nevsun revolved around whether Canadian law could develop appropriate remedies for breaches of customary law norms and whether existing nominate torts were sufficient remedies making such other remedies unnecessary. On the first issue the majority was satisfied that Canada had an international obligation to ensure effective remedy to victims of violations of human rights, and there was no law or other procedural bar precluding the Eritrean workers' claims. Thus, it was not 'plain and obvious' that Canadian courts could not develop a civil remedy in domestic law for corporate violations of customary international law norms adopted in Canadian law (Nevsun 2020: paras 119-122). Furthermore, the Eritrean workers' allegations encompassed conduct not captured by existing domestic torts as their character was of a more public nature since they 'shock the conscience of humanity' (*Nevsun* 2020: para 124), and their heinous nature could not be adequately addressed by such torts, even by awarding punitive damages (*Nevsun* 2020: paras 125-126). Accordingly, this second argument was also no bar to the claims going forward.

The majority decision appears, at first hand, to offer a strong argument for developing Canadian law to encompass direct corporate liability for complicity in human rights violations, arising out of the activities of overseas subsidiaries in conjunction with host state authorities, and based on customary international human rights norms. However, the majority remind us that all of this is to be heard by the trial judge:

> because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law

> should evolve so as to extend the scope of those norms to bind corporations (*Nevsun* 2020: para 113) …
>
> The workers' customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge (*Nevsun* 2020: para 127) …
>
> This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate (*Nevsun* 2020: para 131).

Accordingly, it is yet to be settled whether the majority argument will prevail, based, as it is, largely on academic opinion, which is a subsidiary source of international law under the Statute of the International Court of Justice (Wood 2017). In the circumstances, a close examination of the dissent on this issue is necessary.

Brown and Rowe JJ, while agreeing with the majority on the act of state finding, rejected the claims based on customary international law. They disagreed with the majority on their characterization of the content of international law; the procedure for identifying international law; the meaning of 'adoption' of international law in Canadian law; and the availability of a tort remedy (*Nevsun* 2020: para 135). They identified two theories of the case: the majority's theory based on a cause of action for 'breach of customary international law'; and the chambers judge's theory which saw the claims as being based on new nominate torts inspired by customary international law and which more accurately reflected the worker's pleadings and was to be preferred (*Nevsun* 2020: paras 137 and 143). However, both theories were wrong.

The majority approach displaced the proper role of international law from the Canadian legal system. Canadian law defined the limits of the role played by international law in the Canadian legal system and so international law could not require Canadian law to take a certain direction, except inasmuch as Canadian law allowed it (*Nevsun* 2020: paras 151-152). The majority, in effect, determined a change in Canadian law allowing for a new remedy based on international law which only the act of a competent legislature could undertake (*Nevsun* 2020: para 153). Under Canadian law a treaty required an Act of the legislature to be effective in domestic law while customary international law could have a direct effect on common law, without legislative enactment, but the existence of the norm had to be proven as a matter of fact, be subject to

the absence of conflicting legislation, and could only operate with respect to prohibitive rules of international custom, which prohibit a state acting in a certain way (*Nevsun* 2020: paras159-169). Furthermore, the courts had to follow the legislature if a law was passed in contravention of a prohibitive norm of international law, nor could they construct the law if the legislature failed to pass an Act giving effect to a mandatory norm of international law, requiring the state to act in a certain way (*Nevsun* 2020: para 170). Indeed, the courts were not as well suited to make legal change as the legislature which had the institutional competence and the democratic legitimacy to enact major legal reform. By contrast, the courts were confined to considering the circumstances of the particular parties before them and so could not anticipate all the consequences of a change (*Nevsun* 2020: para 225).

The majority were also wrong in their identification of the content of customary international law. The majority were correct to take judicial notice of the prohibition of crimes against humanity, but not in relation to the contested norm on the question of whether corporations could be held liable at international law. For this the majority relied only on academic opinion which did not indicate that international law *had* thus evolved but, that it *could* so evolve (*Nevsun* 2020: paras 188 and 200, emphasis in the original). Brown and Rowe JJ were unequivocal: 'in our view, that corporations are excluded from direct liability is plain and obvious' (*Nevsun* 2020: para 189).[6] They cited the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises who, in 2007, stated that preliminary research 'has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international law' and the writings of Professor James Crawford to the same effect (*Nevsun* 2020: para 190). In addition, the doctrine of adoption did not transform prohibitive rules such as the prohibition against slavery into a domestic liability rule between individuals and corporations (*Nevsun* 2020: para 194). Furthermore, any mandatory rule to the effect that 'Canada must prohibit and prevent slavery by third parties' could only be given effect through criminal and not civil law, and Parliament had unequivocally prohibited the courts from creating new criminal laws via the common law (*Nevsun* 2020: paras 208-209). Moreover, since there was no simple private law remedy for a simple breach of Canadian public law it would be astonishing for the courts to recognize a private law cause of action for a simple breach of customary international law (*Nevsun* 2020: para 211).

6 Moldaver and Côté JJ agreed on this point: Nevsun 2020: paragraphs 268-269.

Turning to the issue of whether existing torts could suffice, Brown and Rowe JJ held that the majority undervalued the tools Canadian courts already had to condemn crimes against humanity and degrading treatment. Were this action formally for the tort of battery, a court could express its condemnation of the conduct through its reasons. A trial court could also express its condemnation through its damage award (*Nevsun* 2020: paras 220-221).

Furthermore, on the second theory of the case, that the claims require the court to recognize four new nominate torts inspired by international law, Brown and Rowe JJ held that three clear rules governed this exercise:

> (1) The courts will not recognize a new tort where there are adequate alternative remedies; (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Nevsun* 2020: para 237).

Applying these tests, the dissenting justices concluded that the proposed tort of cruel, inhuman or degrading treatment failed the necessity test, since conduct captured by this tort would also be captured by the extant torts of battery or intentional infliction of emotional distress and any greater degree of harm would go to damages (*Nevsun* 2020: para 245). The proposed tort of 'crimes against humanity' also failed as it was too multifarious a category to be the proper subject of a nominate tort and many crimes against humanity would be already addressed under extant torts (*Nevsun* 2020: para 246). On the other hand, the possible torts of slavery and use of forced labour would pass the tests (*Nevsun* 2020: paras 247-249). However, it would be inappropriate for the courts in the present case to recognize the proposed torts based on conduct that occurred in a foreign territory, where the workers had no connection with British Columbia and the defendant corporation had only an attenuated connection to the tort (*Nevsun* 2020: para 251). It would also constitute an unwarranted intrusion into the executive's dominion over foreign relations:

> Canadian courts have no legitimacy to write laws to govern matters in Eritrea, or to govern people in Eritrea. Developing Canadian law in order to respond to events in Eritrea is not the proper role of the court: that is a task that ought to be left to the executive, through the conduct of foreign relations, and to the legislatures and Parliament (*Nevsun* 2020: para 259).

Accordingly, Brown and Rowe JJ would allow the appeal in part and strike the paragraphs of the workers' claims related to causes of action arising from customary international law norms (*Nevsun* 2020: para 266).

The majority decision will be welcomed by proponents of the need for greater corporate accountability for human rights violations. It is also in line with the Canadian courts' generally favourable reception of international law, especially since the adoption of the Charter of Rights and Freedoms (van Ert 2019). However, the contrasting majority and dissenting opinions leave a minefield of unanswered questions for the eventual trial judge. The main point of agreement between all of the Supreme Court judges is that customary international law forms part of Canadian domestic law in the absence of legislation to the contrary. But this does not take us very far in predicting the outcome of the trial. The dissent has questioned whether there exists a customary international law norm by which corporations can be held liable for breaches of human rights in which they are complicit.

In taking this approach, Brown and Rowe JJ made the surprising assertion that customary international law was a question of fact under Canadian law, thus relegating its status to no more than another foreign law. This is contrary to existing Canadian, and international, practice which regards public international law as law (Crawford 2019: 52). As noted by Gib van Ert, Canada's leading expert on the reception of international law in Canada, who was cited by the majority in this regard, 'unlike foreign law, which is treated as a question of fact and therefore requires proof, in conflicts of laws cases, international laws derived from treaties and custom are … to be judicially noticed rather than proved' (van Ert 2018: 6; *Nevsun* 2020: paras 96-98). However, van Ert qualifies this statement by noting that, 'a claimant contending for the existence of a new rule of customary international law may be required to prove in evidence the state practice element of that claim' (van Ert 2018: 6, note 60). The majority answered this point by saying that such an inquiry did not undermine international law as law and that:

> the questions of whether and what evidence may be used to demonstrate the existence of a new norm are not, however, live issues in this appeal. Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as jus cogens, or peremptory norms (*Nevsun* 2020: para 99).

Again, the key issues are left to the trial judge. Given the paucity of legal precedent cited by the majority, it cannot be ruled out that the trial

judge will find that no principle of customary international law exists, to the effect that a parent corporation can be found liable for its complicity, through the acts of its overseas subsidiary, in human rights violations committed against claimants in the host state.

Secondly, the constitutional argument against judicial activism in the field of international law made by the dissent is a familiar one, and one that has found favour in other jurisdictions.

For example, in *Jesner v Arab Bank* (2018) the majority held that neither the language of ATCA nor precedent supported an exception to the general principle that the courts should be reluctant to extend judicially created private rights of action. Such caution should extend, 'to the question whether the courts should exercise the judicial authority to mandate a rule imposing liability upon artificial entities like corporations' (*Jesner* 2018 at 18). This applied with particular force to the ATCA which implicates foreign-policy concerns that are the province of the political branches. (*Jesner* 2018 at 19).

The *Jesner* case involved claims, by victims of terrorist acts committed abroad, against the New York branch of the Arab Bank, a Jordanian financial institution with alleged links to the financing of terrorist groups responsible for these acts. Claims against the Arab Bank had inflamed US relations with Jordan over recent years, a critical ally that saw the litigation as an affront to its sovereignty. Accordingly, it was for Congress, not the courts, to extend private rights of action under the statute (*Jesner* 2018: 26). Finally, the majority also noted that, if the US accepted a right of action for foreign corporations under ATCA, similar actions against US corporations could arise in the courts of foreign states and this could create a dampening of investment that contributed to the economic development that was an essential foundation for human rights (Jesner 2018: 24).

The *Jesner* case reinforces the dissenting view of the proper role of the courts in responding to novel human rights-based claims. As Brown and Rowe JJ noted, the majority in effect sought to use the doctrine of adoption to introduce a Canadian version of ATCA, 'without accounting for the unique statutory context from which the American doctrine arose. It goes without saying that Canadian courts cannot adopt a U.S. statute when Parliament and the legislatures have not.' (*Nevsun* 2020: para 212) A future trial judge may agree.

On the matter of whether existing torts or new nominate torts are necessary to ground the claims in this case, again the majority leave it

for the trial judge to decide (*Nevsun* 2020: para 131). The core question is whether the majority are correct to say that existing torts are not capable of expressing the seriousness of the alleged violations of fundamental human rights. Here, it must be remembered that human rights claims originate against states not private persons or corporations. The dissenting judges have a strong point when they assert that tort remedies can offer effective relief against a corporate wrongdoer, including the use of punitive damages to underscore the seriousness of the breach. Indeed, a variety of regulatory standards, in which human rights violations are implicit, are enforced against corporations through tort remedies (Laplante 2017). Equally, the tort-based approach to corporate liability for human rights violations has made an impact in several jurisdictions starting in common law countries but now extending to civil law jurisdictions.[7] It has also been argued that the common law of negligence may offer a stronger analytical tool than a claim based on a violation of positive human rights obligations for establishing the parameters of, and limits to, liability (Stoyanova 2019). Accordingly, the use of existing tort claims may not effectively deprive the claimants of redress, though, as a matter of Canadian public policy, it may be deemed useful to develop new torts based directly on breaches of customary international law.

A further unanswered issue concerns the factual context of the case. It is not the direct liability of Nevsun that is in issue but complicity in actions undertaken by its Eritrean subsidiary which employed conscript labour through its South African intermediary SENET. This rests on a finding that Nevsun was sufficiently in control of its subsidiary and its operations to be seen as having acquiesced to the use of forced labour and its associated abuses of human rights. This issue was not raised before the Supreme Court, and so the trial judge will be free to develop their own view on this. In the first instance decision Abroiux J held:

> [50] At the relevant times, members of Nevsun's senior management primarily resided in Vancouver, British Columbia. Nevsun's directors resided in Vancouver, Ontario and Connecticut.
>
> [51] Nevsun exercises effective control over BMSC. It controls a majority of the Board of BMSC and Cliff Davis, the CEO of Nevsun, is the Chair of BMSC (*Araya v Nevsun* 2016).

[7] For discussion of early tort claims involving human rights concerns in England, Australia and Canada see Joseph (2004: chapter 6) and for the Netherlands and England see Kamminga and Zia-Zarifi (2000: part III, chapters 9-12); and Meeran (2011). More recent studies include: for a UK perspective: Meeran (2013); Chambers and Tyler (2014) and Srinivasan (2014); for civil law jurisdictions, especially the Netherlands, see Enneking (2012); for a comparative approach see Muchlinski and Rouas (2014).

However, Nevsun denied that Bisha Mine was its asset. It averred that BMSC and not Nevsun was party to the agreements with the state of Eritrea and the Eritrean National Mining Corporation that entitled it to operate the mine. Nevsun also claimed that operational decisions at the material times, including selecting SENET, were made by BMSC's management and that BMSC required SENET to agree not to employ forced labour and ensure any subcontractors it engaged did likewise. Nevsun further asserted that SENET and all subcontractors providing services to BMSC in connection with the Bisha Mine were required to refrain from violence, crime or abuse and to comply with BMSC's corporate policies prohibiting such conduct (*Araya v Nevsun* 2016: paras 54-55). These questions of fact will ultimately determine the case, and the majority decision offers no indication as to how these issues should be determined even though they remain central to any principle of corporate liability for complicity in human rights violations. In effect the majority failed to outline the contours of the proposed liability principle that they say is not plainly and obviously unarguable, nor did it indicate the evidence that would be relevant.

[E] WIDER IMPLICATIONS OF *NEVSUN*: JUDICIAL ACTIVISM IN THE DEVELOPMENT OF TRANSNATIONAL CORPORATE LIABILITY FOR HUMAN RIGHTS VIOLATIONS

The *Nevsun* case raises significant wider issues concerning the role of domestic courts in the progressive development of international law and, in particular, the development of corporate liability for human rights violations. The immediate result of the *Nevsun* decision, whatever the eventual outcome of the case itself, is to raise the threshold of litigation risk for Canadian corporations, opening the door for further claims based on its ruling (Mining Association of Canada, 2019 especially paras 22-28; Debevoise and Plimpton 2020). The Canadian Supreme Court has, in effect, claimed a wide extraterritorial jurisdiction over the foreign conduct of Canadian multinational groups so as to further their compliance with a growing body of human rights-oriented responsibilities. These are based in large part on the United Nations Guiding Principles for Business and Human Rights (UNGPs) (United Nations 2011). However, it has gone further than the UNGPs, which contain only a voluntary responsibility to respect human rights based on a corporate human rights due diligence risk assessment (Muchlinski 2012; Muchlinski forthcoming: chapter 14). The Canadian principle is a legally binding duty subject to a remedy. As

such it goes beyond what is currently available under general international law. Until a binding international treaty outlining corporate legal duties and available remedies is adopted, this will not change (United Nations 2020). It places a question mark against the majority decision and favours the dissent's reading of international law. A further element favouring the dissent is that, in Canada, 'incorporation cases are very rare, seemingly because customs usually concern state-to-state relations and lack application to domestic legal issues' (van Ert 2018). Extending a contested norm of customary international law to a private claim is thus highly unusual in the Canadian legal system. But should this alone have stopped the majority, or cause the eventual trial judge to conclude that such a remedy does not exist?

Canada is committed to upholding international human rights (Government of Canada 2020). It is a signatory of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights, acceding to both instruments in 1976. Canada is also a member of the ILO and has ratified all eight core ILO Conventions including the Convention on Forced Labour (ILO 2020). According to Article 2 of the ICCPR:

> 1 Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2 Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3 Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

According to the UN Human Rights Committee's Interpretative Note 31 on the ICCPR, 'the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party' (UN Human Rights Committee 2004: para 10). The claimants in *Nevsun* clearly fall within this protected category, and indeed the majority accepted that Canada's obligations under Article 2 of the ICCPR required the court to offer a remedy for the reasons given by the UN Human Rights Committee (*Nevsun* 2020: para 119).

Furthermore, it is at least arguable that the Supreme Court, through its decision, was discharging its international legal obligation, as the highest court of the land, to give effect to Canada's human rights obligations. This decision also gives force to Canada's approach to the accountability of Canadian corporations for their international human rights practices. Indeed, the lack of an effective international system of enforcing international law requires that states, including their judicial and other dispute settlement bodies, offer effective remedies. It is required by the UNGPs.[8] In addition, it is legitimate for domestic courts to react to new developments in international law and ensure that domestic law reflects these (Ammann 2019: chapter 4). In such cases the constitutional argument, though correct in its own domestic legal terms, appears at odds with Article 2 of the ICCPR on the facts of this case.

That said, a key legal obstacle to this line of argument is that the Supreme Court of Canada is effectively applying its judicial system, with its contentious reading of customary international law, extraterritorially to facts arising in Eritrea, contrary to the norms of comity and the sovereign equality of states. The issues of comity and sovereign equality were already discussed in relation to the act of state doctrine above and remain open for the trial judge to consider. However, it is hard to see how the sovereign rights of Eritrea are adversely affected in this case, as neither the Eritrean government, nor any of the state-owned enterprises implicated in the alleged violations, is involved as a defendant in the case, nor is the ability of Canada to act freely in its international affairs compromised. Given its commitment to furthering human rights accountability for Canadian corporations on the plane of international

[8] By principle 25 of the UNGPs (United Nations 2011): 'As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.'

affairs there appears no issue of divergence on policy between the executive and the judiciary in this case. Also, given the heinous nature of the allegations in this case, it would sit ill for the Canadian government to argue that this is a matter for diplomacy rather than legal remedy. It is notable that the Canadian government has not intervened in the case to argue that this is not an issue for the courts.

As for the extraterritoriality argument, the right of the claimants to bring a claim before the Canadian courts was challenged on the grounds of *forum non conveniens* at first instance and Nevsun lost. Nevsun's appeal on this issue was also dismissed by the Court of Appeal (*Araya v Nevsun Resources Limited* 2017). The lower courts concluded that, despite the considerable inconvenience of hearing the evidence in Canada, Eritrea could not be the more appropriate forum, due to the 'real risk' of corruption and unfairness in its legal system. As this issue was not appealed, it would appear that Nevsun accepts that the Canadian courts have jurisdiction to hear the claims. However, the wider jurisdictional question remains whether it is appropriate for domestic courts to adjudicate upon the overseas activities of domestic multinational corporate groups.

In such cases, a distinction should be made between situations of direct extraterritorial jurisdiction, as where a statute or court order covers matters entirely outside the forum jurisdiction and affects parties with no connection to the forum, and domestic measures with extraterritorial implications that help influence the behaviour of domestic private actors abroad without the direct use of extraterritorial jurisdiction (see Zerk 2010: 5). The *Nevsun* case is an example of the latter approach.

As was seen above, the Canadian authorities have developed a policy that is designed to affect how Canadian parent companies manage their global operational networks so as to encourage human rights-compliant behaviour across the corporate group. This is a domestic regulatory policy which impacts primarily on Canadian-based parent companies and so is not an exercise of direct extraterritorial regulatory jurisdiction. The Canadian Supreme Court's ruling is also not an example of direct extraterritorial jurisdiction, but a domestic case, based on foreign facts involving a Canadian defendant, which is entirely within the Canadian court's jurisdiction to hear and decide. Nevsun, as a corporation incorporated in British Columbia, is present within the territory of Canada and so is amenable to suit. Should the trial judge find as a matter of fact that Nevsun was indeed in operational control of its Eritrean subsidiary and, as a result, complicit in the alleged violations of human rights

through knowledge and inaction to stop them, then it is highly likely that the decisions affecting BMSC would have been made in British Columbia and the relevant evidence would be located in Nevsun's offices, as well as in the records of BMSC. Equally, Eritrea's sovereignty will not be affected by any Canadian court decision on compensation for the claimants which would be enforced against Nevsun within Canada. Accordingly, the decision is in line with the jurisdictional boundaries of Canadian policy on business compliance with human rights and offers no significant challenge to established norms of jurisdiction.

[F] CONCLUDING REMARKS

To conclude, while there remain strong legal arguments against the development of the international customary law-based remedies for Canadian corporate violations of human rights abroad, the Canadian Supreme Court's activism can be defended. Domestic courts have a significant role to play in the progressive development of international law and to ensure that domestic law develops in line with this. That said, the trial judge may be more cautious, and it may well be that the Supreme Court has effectively 'passed the buck' by leaving open many key questions for that stage of the proceedings. However, the majority decision remains as a precedent for new claims until such time as a subsequent Canadian Supreme Court overrules the case or the Canadian legislature does, though this appears highly unlikely at the time of writing.

As for the case itself, human rights and tort claims against multinational corporate groups often settle out of court, and this case may be no different (see Meeran 2011). That said, regardless of the final outcome, the Supreme Court will have paved the way towards making Canadian corporations warier of creating human rights litigation risk in the context of their overseas operations, especially in countries without a strong legal or administrative system for the protection of human rights. The decision may also incentivize corporate lobbying of the executive and legislature to have the case overruled by statute, though this would set Canada back significantly in its quest for Canadian corporate human rights accountability and would no doubt be strongly criticized by human rights organizations in Canada and more widely. Canada has already been criticized internationally for its lack of oversight over Canadian mining corporations' overseas operations (see Canadian Network on Corporate Accountability 2017), which led to the establishment of the CORE, and any move to overrule the *Nevsun* decision would do further damage to its reputation. So, for now, the decision of the Canadian Supreme Court

remains as a significant, though also legally controversial, precedent in the legal development of binding corporate human rights obligations and as an example of judicial activism that brings the prospect of access to justice not only to the claimants in this case but also to others who may follow.

References

Ammann, Odile (2019) *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* Leiden & Boston MA: Brill Publishing.

Business and Human Rights Resource Centre (2020) 'Corporate Legal Accountability'.

Canadian Network on Corporate Accountability (2017) 'International Human Rights Authorities Call for Extractive Sector Ombudsperson'.

Canadian Network on Corporate Accountability (2019) 'Government of Canada Turns Back on Communities Harmed by Canadian Mining Overseas, Loses Trust of Civil Society' Press release, 11 July.

Chambers, Rachel & Katherine Tyler (2014) 'The UK Context for Business and Human Rights' in Lara Blecher, Nancy Kaymar Stafford & Gretchen C Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* Chicago: American Bar Association.

Crawford, James (2019) *Brownlie's Principles of Public International Law* 9th edition Oxford: Oxford University Press.

Debevoise and Plimpton (2020) 'Canadian Supreme Court Opens Door to Corporate Liability for Human Rights Abuses Abroad' Debevoise in Depth 19 March.

Enneking, Liesbeth F H (2012) *Foreign Direct Liability and Beyond–Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* The Hague: Eleven International Publishing.

Global Affairs Canada (2019) 'Minister Carr Announces Appointment of First Canadian Ombudsperson for Responsible Enterprise (CORE)' News Release 8 April, Ottawa, Ontario.

Government of Canada (2020) 'Canada's Approach to Advancing Human Rights'.

House of Commons Library (2011) The Separation of Powers Commons Research Briefing SN06053 16 August.

International Labour Organization (2020) 'Ratifications for Canada'.

Joseph, Sarah (2004) *Corporations and Transnational Human Rights Litigation* Oxford: Hart Publishing.

Kamminga, Menno and Sam Zia-Zarifi (eds) (2000) *Liability of Multinational Corporations under International Law* The Hague: Kluwer Law International.

Laplante, Lisa J (2017) 'Human Torts' 39 *Cardozo Law Review* 245-312.

Mance, Lord (2017) 'International Law in the UK Supreme Court' London: King's College London 13 February.

Meeran, Richard (2011) 'Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States' 3(1) *City University of Hong Kong Law Review* 1-41.

Meeran, Richard (2013) 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in Surya Deva, and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* Cambridge: Cambridge University Press.

Mining Association of Canada (2019) Factum of the Intervener Nevsun Resources Limited v Araya SCC File Number: 37919, 7 January.

Montesquieu, Charles de Secondat, baron de (c1748) *The Spirit of Laws* (see also: *Montesquieu: The Spirit of the Laws* Anne M Cohler, Basia Carolyn Miller & Harold Samuel Stone (eds) *Cambridge Texts in the History of Political Thought* Cambridge: Cambridge University Press).

Muchlinski, Peter T (2012) 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation' 22(1) *Business Ethics Quarterly* 145-177.

Muchlinski, Peter T (forthcoming) *Multinational Enterprises and the Law* 3rd edition Oxford: Oxford University Press.

Muchlinski, Peter T & Virginie Rouas (2014) 'Foreign Direct Liability Litigation' in Lara Blecher, Nancy Kaymar Stafford & Gretchen C Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* Chicago: American Bar Association.

Newbury, Mary V (2019) 'Foreign Act of State—A Practical Guide from Buttes Gas to Belhaj' 1(1) *Amicus Curiae* (Series 2) 6-46.

Richard, J D (2009) 'Separation of Powers: The Canadian Experience' 47(4) *Duquesne Law Review* 731-760.

Roach, K (2018) 'The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in Crafting Constitutional Remedies' 5(2) *Journal of International and Comparative Law* 315-336.

Srinivasan, Shubhaa (2014) 'Current Trends and Future Effects in Transnational Litigation against Corporations in the United Kingdom' in Lara Blecher, Nancy Kaymar Stafford & Gretchen C Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* Chicago IL: American Bar Association.

Stoyanova, Vladislava (2019) 'Common Law Tort of Negligence as a Tool for Deconstructing Positive Obligations under the European Convention on Human Rights' 23 *International Journal of Human Rights*.

United Nations (2011) Guiding Principles on Business and Human Rights.

United Nations (2020) 'Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights'.

United Nations Human Rights Committee (2004) General Comment No 31 [80] 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' adopted on 29 March (2187th meeting).

van Ert, Gib (2018) 'The Reception of International Law in Canada: Three Ways We Might Go Wrong' Canada in International Law at 150 and Beyond, Paper No 2, January Waterloo: Centre for International Governance Innovation.

van Ert, Gib (2019) 'The Domestic Application of International Law in Canada' in Curtis A Bradley (ed) *The Oxford Handbook of Comparative Foreign Relations Law* Oxford: Oxford University Press.

van Santen, B (2018) 'Turbulent Origin and an Uncertain Legacy: The Separation of Powers in the United States and Canada' 3(1) *Cambridge Law Review* 256-287.

Wood, Sir Michael (2017) 'Teachings of the Most Highly Qualified Publicists (Art 38 (1) ICJ Statute)' *Max Planck Encyclopaedia of Public International Law* (MPEPIL).

Zerk, Jennifer (2010) 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' Corporate Social Responsibility Initiative Working Paper No 59 Cambridge MA: John F Kennedy School of Government, Harvard University.

Legislation Cited

Canada Constitution Acts 1867 to 1982

Canada Order in Council (2019) PC 2019-299 of 8 April

United States Alien Tort Claims Act 28 US Code § 1350

Cases Cited

Araya v Nevsun Resources Limited 2016 BCSC 1856

Araya v Nevsun Resources Limited 2017 BCCA 401

Belhaj v Straw [2017] UKSC 3

Doe v Nestle, SA, 906 F (3d) 1120 (9th Cir 2018)

Doucet-Boudreau v Nova Scotia 2003 SCC 62

Jesner v Arab Bank 584 US ____ 12 (2018) Slip Opinion; 57 ILM 631 (2018)

Kiobel v Royal Dutch Petroleum 569 US ____ (2013) Slip Opinion; 52 ILM 969 (2013)

Kuwait Airways Corporation v Iraqi Airways Co [2002] AC 883 (HL)

Nevsun Resources v Araya 2020 SCC 5

Operation Dismantle v The Queen [1985] 1 SCR 441

Oppenheimer v Cattermole [1976] AC 249 (HL)

Vedanta Resources plc & Another v Lungowe & Ors [2019] UKSC 20